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IN THE UTAH COURT OF APPEALS

MURRAY TOWERS, L.C., a Utah limited liability company, and BRAD OLSEN, Plaintiffs and Appellants, vs. BJORN T. BANG aka BILL BANG; and LAKELINE DEVELOPMENT, L.C., a Utah limited liability company, Defendants and Appellees.	Appeal No. 20110049-CA

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court in and for Salt Lake County
The Honorable Mark S. Kouris, Presiding

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FILED
UTAH APPELLATE COURTS

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TABLE OF CONTENTS

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

TABLE OF AUTHORITIES

Cases

Statutes

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
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Rules

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INTRODUCTION

This case and appeal were nominally filed on behalf of a company, Murray Towers, L.C. ("Murray Towers"). In reality, however, they are part of an ongoing dispute between the two 50%-owning members of Murray Towers: (1) Bradley Olsen, who filed this litigation and appeal, and (2) Lakeline Development, L.C. ("Lakeline"), via its managing member, Bjorn Bang. Olsen and Bang have been in litigation against each other for several years.

In this case, Lakeline obtained a loan for its own purposes using Murray Towers's real property as collateral. Olsen alleged that he did not give his permission for the loan, and Lakeline alleged that Olsen was informed of and consented to the loan. Olsen filed claims against Lakeline and Bang for constructive fraud, conversion, breach of fiduciary duty, and declaratory judgment based entirely on the loan. The trial court, Judge Kouris presiding, dismissed all of Olsen's claims except for his claim for breach of fiduciary duty, and then granted judgment on that claim in the exact amount of the loan (Olsen had proven no other harm). (R. 452). When Lakeline and Bang satisfied the loan and released the collateral, Judge Kouris determined that Lakeline and Bang were entitled to an offset in the amount of the loan. Lakeline and Bang also paid all of the attorney fees and costs that Olsen had incurred in this case.

However, despite satisfaction of the loan and payment of all of his attorney fees and costs, Olsen has pressed on, filing this appeal and challenging Judge Kouris's decision. It is difficult to comprehend what more Olsen wants. Regardless, Olsen challenges Judge

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Kouris's determination that Lakeline and Bang are "entitled to an offset" without marshaling any of the facts supporting Judge Kouris's decision – even attacking the decision as "not supported by credible evidence" without even stating what such evidence was. (Br. at 5). In addition, Olsen criticizes Lakeline and Bang for the manner in which they obtained relief from the Judgment; however, Olsen fails to state how Judge Kouris exceeded his authority under Rule 60(b) to "relieve a party from a final judgment" based on "any reason justifying relief." UTAH R. CIV. P. 60(b). Finally, Olsen fails to show how Judge Kouris's action in any way exceeded "harmless" error. Therefore, Olsen's appeal should be denied and Judge Kouris's decision affirmed.

JURISDICTIONAL STATEMENT

This Court has jurisdiction by transfer of this appeal from the Utah Supreme Court pursuant to Utah Code Ann. § 78A-4-103(2)(j). The Utah Supreme Court had original jurisdiction over the appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j).

APPELLEES' STATEMENT OF ISSUES PRESENTED

1. Does Appellants' failure to marshal the evidence supporting the district court's findings on the order appealed from preclude all relief requested in this appeal?

Standard of Review: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ." UTAH R. CIV. P. 52(a); *see also Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177, 1184. To establish that a finding of fact is erroneous, the appellant

> must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence. If the

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> evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence.

Chen, 2004 UT 82 at ¶ 19 (citation omitted). "Even where the [appellants] purport to challenge only the legal ruling ..., if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the [appellants] also have a duty to marshal." *Id.* ¶ 20. *See also United Park City Mines Co. v. Stitching Mayflower Mountain Fonds*, 2006 UT 35, ¶ 24, 140 P.3d 1200, 1206 ("To pass this threshold, parties protesting findings of fact must marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." (quotation omitted)).

2. Did the trial court exceed its broad authority under Rule 60(b) to relieve Lakeline and Bang from a portion of the Judgment that he had previously entered?

Standard of Review: "The trial court is afforded broad discretion" in relieving a party from the effect of a judgment pursuant to Utah R.Civ.P. 60(b), and "its determination will not be disturbed absent an abuse of discretion." *Birch v. Birch*, 771 P.2d 1114, 1117 (Utah Ct. App. 1989) (citing *Katz v. Pierce,* 732 P.2d 92 (Utah 1986) and *Russell v. Martell,* 681 P.2d 1193, 1194 (Utah 1984)).

3. If the trial court erred in determining that Lakeline and Bang were entitled to an offset in the Judgment in the amount of the Prisbrey Loan that they satisfied, did such exceed "harmless error"?

Standard of Review: Harmless error is "any error or defect in the proceeding which does not affect the substantial rights of the parties." UTAH R. CIV. P. 61. "Harmless errors are errors which, although properly preserved below and presented on appeal, are

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sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings." *State v. Burke*, 2011 UT App 168, ¶ 87, __ P.3d __ (quoting *State v. Hamilton,* 827 P.2d 232, 240 (Utah 1992); *see also H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 44, 203 P.3d 943). "If the error was harmless, that is, if the error was sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the case, then a reversal is not in order." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 13, ¶ 22, 70 P.3d 35 (quoting *Price v. Armour,* 949 P.2d 1251, 1255 (Utah 1997)).

DETERMINATIVE RULES

Utah Rules of Civil Procedure, Rule 52(a) (in part)**:**

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.

Utah Rules of Civil Procedure 60(b) (in part)**:**

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Utah Rules of Civil Procedure, Rule 61:

> *Harmless error.* No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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Utah Rules of Appellate Procedure, Rule 24(a)(9) (in part):

> A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

STATEMENT OF THE CASE

At the outset of his Statement of the Case, Olsen asserts that the "underlying facts are not in dispute and any factual dispute was resolved at trial." (Br. at 2). However, this appeal centers on what happened after trial, and particularly Judge Kouris's factual determinations after entry of judgment, which Olsen challenges in this appeal.

I. NATURE OF THE CASE

This is a dispute between the two 50%-owning members of Murray Towers, L.C. ("Murray Towers"): Lakeline Development, L.C. ("Lakeline") and Brad Olsen. (R. 468-469). Lakeline and its managing member, Bjorn Bang, obtained a home loan using the company's property as collateral. (R. 46, 53). Olsen filed suit, claiming that Lakeline and Bang had done so without his permission. (R. 1-8). Lakeline and Bang asserted that Olsen knew of the loan and provided his permission to encumber the property, but was now reneging due to disputes among the two members. (R. 53-54).

II. COURSE OF PROCEEDINGS

On January 29, 2007, Olsen filed his Complaint in this case. (R. 1-6). Olsen's Amended Complaint alleged claims of constructive fraud, conversion, breach of fiduciary duty, and declaratory judgment. (R. 47-49). At trial, Judge Kouris dismissed all of Olsen's claims except for breach of fiduciary duty. (R. 452). Judge Kouris then granted judgment against Lakeline and Bang on that claim in the exact amount of loan at issue. (R. 452).

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After the entry of Judgment, Olsen sought to obtain all of Bang's interest in Lakeline via a sheriff's sale. (R. 372-378). In response, Lakeline and Bang fully satisfied the loan, sent a check to Olsen in payment of all remaining amounts under the Judgment, and filed a motion to stay the sheriff's sale based on their satisfaction of the judgment. (R. 379-387 and 613 at 9:16-23). However, Olsen objected that the Judgment was not satisfied, claiming that he wanted to get the money originally provided under the loan, not just have the loan repaid. (R. 416-424).

III. DISPOSITION IN THE TRIAL COURT

Judge Kouris rejected Olsen's new claim. He determined, based upon the facts before him, that the loan had been the basis for Olsen's Complaint, that it had been fully repaid, and that Murray Towers was no longer encumbered by the Loan. (R. 613 (*see* esp. 17:10, 16-17 ("This case is purely a cash issue . . . . The only thing that had to happen here was the loan had to get retired. He retired the loan.")). Based on these factual determinations, Judge Kouris ruled that Lakeline and Bang were entitled to an offset of the Judgment in the amount of the Prisbrey Loan. (Addendum, Br. of Appellant). Lakeline and Bang then paid all of the remaining amount of the Judgment, which consisted solely of costs and attorney fees. (Addendum, Br. of Appellant).

On January 14, 2011, Olsen filed a notice of appeal. On February 10, 2011, the Court issued a Sua Sponte Motion for Summary Disposition for lack of jurisdiction, pointing out that Olsen's appeal was not based upon a final, appealable order. Olsen obtained a new order from the district court, and this Court withdrew its Motion.

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IV. STATEMENT OF FACTS

Lakeline Development, L.C. ("Lakeline") and Brad Olsen each own a 50% membership interest in Murray Towers, L.C. ("Murray Towers"). (R. 468-469). Murray Towers's primary asset is certain real property located at 50 East Columbia Avenue in Salt Lake City (the "Property"). (R. 53). Lakeline's managing member, Bjorn Bang, used the Property as collateral for a home loan through a lender called Prisbrey Investment Company (the "Prisbrey Loan" or the "Loan"). (R. 46, 53). Bang did so via a trust deed executed on behalf of Murray Towers. (R. 46, 53, 475). Bang also personally guaranteed the Prisbrey Loan. (R. 473). Years after he allegedly discovered the loan, Olsen filed suit[1] against Lakeline and Bang, claiming that Lakeline had failed to obtain Olsen's permission for the Prisbrey Loan and that Bang had improperly encumbered the Property thereby. (R. 3, 8). Lakeline and Bang responded that Olsen both knew of and had agreed to the loan. (R. 25).

On January 29, 2007, Olsen filed his Complaint in this case. (R. 8). Later, Olsen filed an Amended Complaint, alleging claims of constructive fraud, conversion, breach of fiduciary duty, and declaratory judgment.[2] (R. 47-49). At trial, Judge Kouris dismissed all of Olsen's claims except for his claim for breach of fiduciary duty. (R. 452). Judge Kouris then granted judgment against Lakeline and Bang on that claim in the exact amount of the Prisbrey Loan, to put Murray Towers "in a position that [it was] prior to the breach." (R.

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[1] Olsen filed suit in his own name and purportedly in behalf of Murray Towers (Olsen is a 50% member of Murray Towers, a member-managed company). (R. 468-469).

[2] Lakeline Development counterclaimed, seeking dissolution due to the members' deadlock in managing the company. (R. 57-58). At trial, Judge Kouris found insufficient evidence for dissolution. (R. 276).

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452, 612 at 4:12-20). The Prisbrey Loan was the sole basis for both the entry and the amount of the Judgment. (R. 452, 612 at 4:12-20).

After the entry of Judgment, Lakeline fully satisfied the Prisbrey Loan, removed the related Trust Deed as an encumbrance upon Murray Towers' Property, and obtained a formal Release of the Trust Deed and Note. (R. 556). In addition, Lakeline obtained from Prisbrey and provided to Olsen an "Acknowledgment of Satisfaction and Release of Trust Deed Note," confirming that the Note had been satisfied and the Trust Deed removed as an encumbrance. (R. 556). However, Olsen objected that such was insufficient, newly claiming that it was not enough that the Prisbrey Loan was repaid – Olsen now wanted to get the money originally provided under the Prisbrey Loan, in the amount of $130,000.00. (R. 569-582).

Judge Kouris rejected Olsen's contention. He determined, based upon the facts before him, that the Prisbrey Loan had been the basis for Olsen's Complaint, that it had been fully satisfied, and that Murray Towers was no longer encumbered by the Loan. Judge Kouris noted in rendering the decision giving rise to this appeal: "This case is purely a cash issue . . . . The only thing that had to happen here was the loan had to get retired. He retired the loan." (R. 613 at 17:10, 16-17). Judge Kouris therefore ruled that Lakeline and Bang were entitled to an offset of the Judgment in the amount of the Prisbrey Loan. (Addendum, Br. of Aplt). Lakeline and Bang paid all of the remaining amount of the Judgment, which consisted solely of costs and attorney fees. (Addendum, Br. of Aplt).

On January 14, 2011, Olsen filed a notice of appeal. On February 10, 2011, the Court issued a Sua Sponte Motion for Summary Disposition for lack of jurisdiction, pointing

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out that Olsen had filed an appeal that was not based upon a final, appealable order. Olsen obtained a new order from the district court, and this Court withdrew its Motion.

SUMMARY OF THE ARGUMENT

In his Brief, Olsen challenges Judge Kouris's decision that Lakeline and Bang were entitled to an offset against the amount of the Judgment. However, Olsen completely fails to marshal the evidence in support of Judge Kouris's decision. To the contrary, he attacks that decision as "not supported by credible evidence." (Br. at 5). Olsen's failure to even attempt to marshal the evidence is ample grounds to deny his appeal and affirm Judge Kouris's decision.

Moreover, Olsen criticizes Lakeline's and Bang's actions in seeking to satisfy the Judgment. However, the pertinent issue is whether Judge Kouris erred in determining that Lakeline and Bang were entitled to an offset, and thus in relieving them from the effects of that Judgment. Under Rule 60(b), Judge Kouris had substantial discretion to, "in the furtherance of justice relieve a party or his legal representative," including when "it is no longer equitable that the judgment should have prospective application" or "any other reason justifying relief from the operation of the judgment." UTAH R. CIV. P. 60(b). To meet his burden, Olsen must show that Judge Kouris's decision was clearly erroneous. Olsen's citations of cases from other jurisdictions do not even address this situation – where a trial court has granted relief from judgment – and are simply inapt. Olsen was fully compensated for filing this case; he received both the satisfaction of the encumbering loan and full payment for his attorney fees and costs. He is not entitled to receive a double payment.

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Finally, even if Olsen had satisfied the marshaling requirement and shown that Judge Kouris was clearly erroneous in granting Lakeline and Bang relief from part of the Judgment, Olsen has not shown how Judge Kouris's decision constituted anything more than harmless error. Olsen has failed to prove "substantial injustice" has occurred in any regard. The Loan which was the entire basis for this lawsuit has been satisfied. The costs and attorney fees that he incurred in bringing this case through judgment and beyond have been fully paid. Olsen does not even approach any of his burdens in this appeal. The appeal should be dismissed and Judge Kouris's order affirmed.

ARGUMENT

I. OLSEN HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S ADVERSE FINDINGS OF FACT.

Utah R. App. P. 24(a)(9) requires Olsen to marshal the evidence supporting each finding of fact by the district court that he challenges on appeal. *See* Utah R. App. P. 24(a)(9). The Supreme Court has recently stated:

> To adequately fulfill the marshaling requirement, the appellant must temporarily assume the role of his adversary, presenting us, "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Chen v. Stewart*, 2004 UT 82, ¶ 77, 100 P.3d 1177 (quoting *Neely v. Bennett*, 2002 UT App 189, ¶ 11, 51 P.3d 724). . . . [T]he appellant must educate the court as to exactly how the trial court arrived at each of the challenged findings. This requires "a precisely focused summary of all the evidence supporting the findings," correlated to the location of that evidence in the record. *Id.*

Friends of Maple Mountain, Inc. v. Mapleton City, 2010 UT 11, ¶ 10, 228 P.3d 1238. This Court has characterized the "marshaling process" as "arduous and painstaking," an undertaking that requires appellant's counsel to become "the devil's advocate" for the adversary's position. *Kimball v. Kimball*, 2009 UT App 233, ¶ 21, 217 P.3d 733 (quoting *West Valley City v.*

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Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). Furthermore, as noted above, "[e]ven where the [appellants] purport to challenge only the legal ruling …, if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, the [appellants] also have a duty to marshal." *Chen*, 2004 UT 82 at ¶ 19 (citation omitted).

In his Brief, Olsen failed to marshal the evidence supporting Judge Kouris's determinations. Specifically, Judge Kouris determined that Lakeline and Bang were "entitled to an offset in the amount of $130,000 against the amount due under the final Judgment entered on May 10, 2010 for the post-judgment payment made by Defendants to" Prisbrey. (Addendum, Br. of Aplt.). Why did Judge Kouris determine that Lakeline and Bang were entitled to an offset? What were the factual bases for Judge Kouris's decision? We do not know because Olsen has failed to supply that information, as required by both Rule 24 and this Court's (and the Supreme Court's) prior decisions.

In fact, Olsen not only failed to marshal the evidence *supporting* Judge Kouris's decision, he directly *attacked* Judge Kouris's decision as "**not supported by credible evidence** to support the requested offset." (Br. at 5) (emphasis added). In addition, Olsen argues that "**the facts of this case demonstrate** that payment of the judgment would not result in a windfall or a double recovery." (Br. at 12) (emphasis added).

Ultimately, Olsen has failed to "educate the court as to exactly how the trial court arrived at each of the challenged findings." *Friends of Maple Mountain*, 2010 UT 11 at ¶ 10. Olsen has failed to provide a "precisely focused summary" or "comprehensive and fastidious" presentation of "every scrap of competent evidence" supporting the district

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court's findings. Rather, his Brief has provided no such evidence at all; it simply challenges Judge Kouris's conclusion that Lakeline and Bang were entitled to an offset. Because Olsen has failed to meet this burden in this appeal, the appeal should be denied and Judge Kouris's decision affirmed.

II. OLSEN HAS FAILED TO PROVE THAT JUDGE KOURIS HAD INSUFFICIENT GROUNDS FOR RELIEVING DEFENDANTS FROM PART OF THE JUDGMENT.

Olsen spends much of his Brief critiquing Lakeline's and Bang's actions in litigation after the Judgment was entered. But the true issue in this Appeal is whether Judge Kouris erred in his decision to relieve Lakeline and Bang from part of the Judgment that he had entered – not what actions Lakeline and Bang took to obtain such relief.[3]

In particular, as his primary argument, Olsen cites a 1965 case from Wisconsin for the proposition that "a judgment for the payment of money can only be satisfied with money." (Br. at 7). Based on this and similar cases, Olsen contends that Lakeline's and Bang's method for obtaining relief from part of the Judgment was improper. (Br. at 7). Notably, Olsen cites no controlling authority. In addition, Olsen's cited cases say nothing about whether the *trial court* erred in relieving a party from judgment after failing to pay money, or for any other reason.

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[3] Olsen later seems to acknowledge this point by arguing that "the judgment did not [allow] Defendants" the option to satisfy the Prisbrey Loan themselves and therefore "the trial court erred when it allowed defendants to have an offset." (Br. at 11). However, this suggests that Judge Kouris himself was bound by the Judgment, as if by a controlling precedent. This ignores Rule 60(b), discussed herein, as well as the trial court's inherent ability to review and reconsider its own decisions. *See, e.g., IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 27, 196 P.3d 588 ("While a case remains pending before the district court prior to any appeal, the parties are bound by the court's prior decision, but the court remains free to reconsider that decision."). The Judge governs the Judgment, not vice versa.

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Frankly, the issue here is not "how to satisfy a judgment" at all, and Olsen's cases are simply inapt. This discussion is governed by Utah Rule of Civil Procedure 60(b), which defines when the trial court can relieve a party from the effects of a final judgment. That rule provides trial court judges with substantial latitude. It states, *inter alia*:

> On motion and upon such terms as are just, **the court may in the furtherance of justice relieve a party or his legal representative from a final judgment**, order, or proceeding for the following reasons: . . . . (5) **the judgment has been satisfied**, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, **or it is no longer equitable that the judgment should have prospective application;** or (6) **any other reason justifying relief from the operation of the judgment.**

UTAH R. CIV. P. 60(b) (emphasis added). Thus, after marshaling the evidence, Olsen's burden in his Brief was to show that Judge Kouris's factual findings were clearly erroneous and that there was no "reason justifying relief from the operation of the judgment." *Id.* Notably, one such reason under the Rule is that "it is no longer equitable that the judgment should have prospective application." *Id.*

Olsen has plainly failed to prove that Judge Kouris's factual findings were erroneous, as set forth above (failing even to marshal the evidence that supported them). However, Olsen has also failed to prove that Judge Kouris had no sufficient reason justifying relief from the Judgment. In fact, Judge Kouris had ample reason for reducing the Judgment by the amount of the Prisbrey Loan: Murray Towers no longer had any obligation related to the Loan. The Loan had been satisfied. The Trust Deed encumbering Murray Towers's property had been released. There was no longer any basis for the amount of the Prisbrey

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Loan to reside in the Judgment at all.[4] In rendering the decision giving rise to this appeal, Judge Kouris noted: "This case is purely a cash issue . . . . The only thing that had to happen here was the loan had to get retired. He retired the loan." (R. 613 at 17:10, 16-17).

Moreover, the only harm that Olsen proved at trial was the existence of the encumbrance (not that he or Murray Towers had actually been harmed by it) and had incurred attorney fees and costs as a result. However, Judge Kouris did not relieve Lakeline and Bang from the obligation to pay Olsen's attorney fees. In fact, Lakeline and Bang paid every penny of the attorney fees and costs that Judge Kouris awarded pursuant to the Judgment. (R. 276; Addendum, Br. of Aplt.). Even when Lakeline and Bang objected to several of Olsen's requested attorney fees and costs, Judge Kouris awarded all of them to Olsen. (R. 614 (esp. 32:24-33:12, 34:25-35:5). Thus, every conceivable harm to Olsen (and Murray Towers) has been eliminated, either by the Trust Deed's removal or the payment of Olsen's fees and costs in effectuating it. Frankly, Lakeline and Bang were bewildered to receive Olsen's Notice of Appeal in this matter at all. At this point, with all possible relief afforded to Olsen and Murray Towers, Lakeline and Bang can only assume that Olsen's intent in filing this appeal is to extract either a windfall or a pound of flesh – neither of which is authorized by law.

Olsen argues that he would not obtain a windfall by gaining both the release of the Trust Deed and an additional $130,000 – the amount of the Trust Deed Note – because the

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[4] If anything, one could question why Judge Kouris would award the amount of the Prisbrey Loan in the first place, since Olsen offered no evidence at trial that any actual harm resulted to Murray Towers or him from the existence of the Prisbrey Loan, aside from the sitting encumbrance of the Trust Deed (which had never prevented financing, caused Murray Towers to make payments that it was not reimbursed, etc.).

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parties are now litigating the dissolution of Murray Towers in a separate case, and the parties can address offsets in that forum. (Br. at 12-14). In other words, Olsen seems to suggest that the better litigation strategy for Lakeline and Bang would have been to address the Prisbrey Loan offset in the new dissolution litigation, not in this case. While Olsen's logic is difficult to follow throughout Section II of his Argument, it seems clear that whether Lakeline and Bang should obtain relief from the Judgment in this case was best determined in this case – not in any other subsequently-filed case. Opposing the Judgment only in the later, dissolution action would likely have resulted in issue preclusion or other res judicata effect in the new action. Also, contrary to Olsen's odd contention, there was no effort before Judge Kouris "to reopen the litigation on the breach of fiduciary duty" (Br. at 14); the point was to satisfy and/or have relieved all obligations under the Judgment resulting from that litigation.

Olsen also argues that Lakeline and Bang "have offered no evidence that the loan has been repaired." (Br. at 15). Based on this, Olsen argues that if Lakeline and Bang default on that obligation, Olsen may still be forced into litigation because the creditor of Lakeline could execute on Lakeline's interest in Murray Towers. (*See id.*). It is difficult to see any relevance in this argument. Even the telephone company *could* obtain a judgment against Lakeline for not paying a phone bill, and then execute on Lakeline's interest in Murray Towers; such would not harm or hinder Murray Towers or Olsen in any way, but would only substitute the person who receives Lakeline's benefits from membership. Any creditor *might* do this. Regardless, such a discussion is highly speculative and unripe for decision here. Ultimately, Section II of Olsen's Argument is not only confusing, but inapt.

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III. OLSEN HAS FAILED TO PROVE THAT "SUBSTANTIAL JUSTICE" MANDATES OVERTURNING JUDGE KOURIS'S DECISION.

Even if Olsen had satisfied both the marshaling requirement and shown that Judge Kouris had exceeded his authority under Rule 60(b) – which Olsen has not done – Olsen has failed to show that Judge Kouris's decision was anything more than harmless error. Utah Rule of Civil Procedure 61 provides the basic standard for harmless error:

> *Harmless error.* No error in either the admission or the exclusion of evidence, and **no error or defect in any ruling or order** or in anything done or omitted by the court or by any of the parties, **is ground for** granting a new trial or otherwise **disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.** The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

UTAH R. CIV. P. 61 (emphasis added). "Harmless errors are errors which, although properly preserved below and presented on appeal, are sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings." *State v. Burke*, 2011 UT App 168, ¶ 87, __ P.3d __ (quoting *State v. Hamilton,* 827 P.2d 232, 240 (Utah 1992); *see also H.U.F. v. W.P.W.*, 2009 UT 10, ¶ 44, 203 P.3d 943). "If the error was harmless, that is, if the error was sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the case, then a reversal is not in order." *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 13, ¶ 22, 70 P.3d 35 (quoting *Price v. Armour,* 949 P.2d 1251, 1255 (Utah 1997)).

In this case, Judge Kouris determined that Lakeline's satisfaction of the $130,000 Prisbrey Loan, which generated the Judgment, relieved Lakeline and Bang from paying $130,000 of the Judgment. (Addendum, Br. of Aplt.). This was, at worst, harmless error. Crucially, this case arose entirely because of the Prisbrey Loan. Olsen's Amended Complaint

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alleges no improper conduct by Lakeline or Bang aside from their obtaining the Prisbrey Loan using the Property as collateral.[5] (R. 44-50). The Amended Complaint alleges no actual harm that Olsen or Murray Towers has ever sustained aside from the encumbrance of the Prisbrey Loan on the Property.[6] (R. 44-50). After Judge Kouris dismissed all of Olsen's other claims, he granted judgment to Olsen and Murray Towers solely in the amount of the Prisbrey Loan and Olsen's attorney fees and costs. (R. 452). As Olsen's counsel later acknowledged, "the judgment was for the amount taken, based on the breach of fiduciary duty, $130,000." (R. 614 at 15:15-17). At the time that the Judgment was entered, Murray Towers had, on its balance sheet, a Judgment against Lakeline and Bang in the amount of $130,000, the exact amount of the Prisbrey Loan).

There is no dispute that Lakeline and Bang fully repaid the Prisbrey Loan. (R. 556). The encumbrance on the Property was lifted. (R. 556). Murray Towers was fully relieved of the obligation to pay the Prisbrey Loan. (R. 556). Therefore, Judge Kouris decided that Lakeline's and Bang's obligation to pay the exact amount of the Prisbrey Loan in the Judgment was also relieved. (Addendum, Br. of Aplt.). Judge Kouris provided equal

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[5] The Amended Complaint refers to payments under the Prisbrey Loan that Olsen alleges he made. (R. 47). However, it is undisputed that Lakeline reimbursed Murray Towers for all such payments after receiving notice of such, and long before trial took place.

[6] At one point in his Brief, Olsen claims that "the trial went beyond the amount owed on the Prisbrey loan." (Br. at 16). However, Olsen fails to identify or cite anywhere in the record any of the issues that he believes "went beyond" the Prisbrey Loan. In addition, the only other specific reference made by court or counsel was to payments made toward the Prisbrey Loan, which the parties do not dispute were all reimbursed by Lakeline. (R. 46). In any event, the evidence at trial did not expand the scope of Olsen's Amended Complaint, the relief he sought, or what was ultimately awarded by Judge Kouris following his bench trial, nor did Olsen submit a motion to conform to the evidence any new matter developed during trial.

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treatment on both sides of the ledger. In fact, Judge Kouris went to great lengths to fashion a remedy that he felt was fair and equitable to both sides. (R. 613 at 33:15-18 ("I think that the goals of both sides, however, can be fulfilled maybe a little bit different way through a – through a way of equity."); *see also id.* at 20:9-42:20). Olsen utterly fails to prove that Judge Kouris's decision resulted in "substantial injustice." UTAH R. CIV. P. 61.

Notably, when the Judgment was entered, Bang was a personal guarantor on the Prisbrey Loan. (R. 46, 473). If Lakeline and Bang had paid the amount of the Prisbrey Loan to Murray Towers and Olsen in direct repayment of the Judgment, Olsen could have simply held the money instead of applying it to repay the Prisbrey Loan. As a 50% member of Murray Towers in heated disputes with Lakeline, he certainly could choose to do so. (R. 468-469). The result would be a patently unjust *obligation* by Bang to repay the Prisbrey Loan without the *ability* to apply the money paid under the Judgment to do so.

In essence, what Olsen seeks in this Appeal is both the repayment of the Prisbrey Loan, which encumbered the Property in the amount of $130,000, and an additional $130,000 in payment under the Judgment. Such a double recovery would surely cause substantial injustice – not prevent it.

In summary, even if Olsen had marshaled the evidence (which he has not) and shown that Judge Kouris's decision was clearly erroneous (which he has not), because Olsen has failed to show anything more than *at worst* harmless error, his appeal should be denied and Judge Kouris's decision affirmed.

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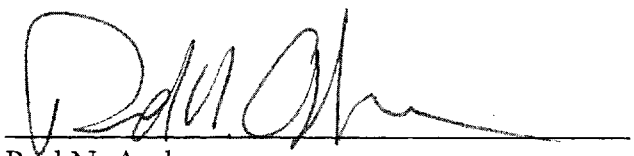
CONCLUSION

For all of the foregoing reason, this Court should affirm the district court's Order below.

DATED this 20th day of September 2011.

KIRTON & McCONKIE



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BRIEF OF APPELLEES** was served this 20th day of September, 2011, by mailing on said date two copies thereof by United States mail, first class postage prepaid, addressed to:

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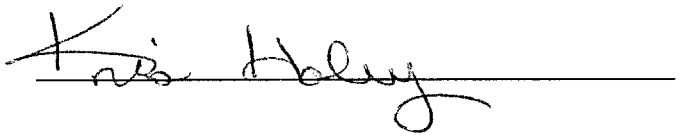

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